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No. 98-1735

In the

Supreme Court of the United States

October Term, 1998

BESTFOODS (formerly known as
CPC INTERNATIONAL, INC.),

Petitioner,

v

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY TO BRIEF IN OPPOSITION

JOHN M. PETERSON
Counsel of Record
GEORGE W. THOMPSON
CURTIS W. KNAUSS
Neville, Peterson & Williams
Counsel for Petitioner Bestfoods
80 Broad Street, 34th Floor
New York, New York 10004
(212) 635-2730

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In accordance with United States Supreme Court Rule 15.6, petitioner Bestfoods (formerly known as CPC International, Inc.) hereby submits this Reply Brief addressing new points raised in the *Brief for the United States in Opposition* to the petition for a writ of *certiorari* to the United States Court of Appeals for the Federal Circuit.

ARGUMENT

1. The *NAFTA Marking Rules* Applied to Determine Origin Marking Requirements for Goods Produced Domestically Will Affect the Marking of Petitioner's Goods and Will Have a Broad Impact on Administration of the Marking Law.

The government erroneously asserts that the question of whether the "substantial transformation" test should be applied in addition to the NAFTA marking rules "is not properly framed for review here, for a determination of the governing legal standard would not alter the disposition of the substantive controversy." *Brief for the United States in Opposition (Opposition Brief)* at 5. This assertion is directly refuted by the Federal Circuit's opinion, wherein it refused to even consider the question of whether the imported article underwent a substantial transformation:

> Because we conclude that the Treasury Department's tariff-shift regulation is valid, we find it unnecessary to consider whether Customs' ruling would be upheld under the pre-NAFTA standards for determining whether a good has undergone a substantial

transformation after its importation, as held by the Court of International Trade.

Appendix (App.) at 11a-12. While the trial court did order the agency to apply the substantial transformation test, and upheld the agency's determination thereunder, the Federal Circuit vacated that part of the trial court's judgment. In petitioning for a writ of *certiorari*, Bestfoods seeks precisely the determination that the Federal Circuit's decision precludes it from obtaining: whether its goods must be marked as a product of Canada *under the substantial transformation standard.*

The government's reliance on *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), and its argument that Bestfoods has raised an abstract question that is not framed for review, are both mistaken. The Court in *Herb* considered that an abstract question would be raised "if the same judgment would be rendered by the state court after we corrected its views of federal laws," and "it is manifest that no view we might express of the federal Act would require [the state] courts to proceed to the trial of these actions." By contrast in this case, a decision by the Supreme Court that the substantial transformation standard applies would permit Bestfoods to raise before the Federal Circuit the question of the goods' substantial transformation in the United States. That is the issue the appellate court explicitly refused to address because of its conclusion that the substantial transformation standard was replaced by the NAFTA marking rules, and it is the issue the Federal Circuit would have to consider if Bestfoods appeal to this Court is successful.

2. Congress in 1938 Expressly Denied the Secretary of the Treasury the Power to Define the Scope of Operation of the Marking Law; The *NAFTA Implementation Act* Did Not Restore Such Power.

The government in its opposition repeats the same error that the Federal Circuit committed in its decision: it assumes that the statutory provision in 19 U.S.C. § 1304(a), requiring the marking of "every article of foreign origin," was somehow supplanted by the authorization of NAFTA rules to determine whether certain goods qualify as "goods of a party" for NAFTA purposes. Not only is there nothing in the NAFTA legislation or agreement that allows conflation of these two very different issues, but there is an explicit prohibition against implicit repeals of existing legislation. Bestfoods' petition for a writ of *certiorari* demonstrated that the Federal Circuit disregarded this bar, and the government's response essentially skirts the issue.

Petitioner believes that it has demonstrated the fatal errors in the appellate court's decision. Moreover, the gravity and consequences of those errors warrant review by this Court. The Federal Circuit has allowed an administrative agency to effectively repeal a statutory requirement and replace it with agency rules that were prepared pursuant to a different statutory grant of authority with a different purpose. The Federal Circuit has flouted a clear Congressional admonition against implicit repeals and it has allowed the Secretary to impose a more stringent marking regime on NAFTA articles in direct contravention of the liberalizing purposes of a Free Trade Agreement. For these reasons, this Court should grant the writ and correct the demonstrated errors committed by the Federal Circuit.

A. The government erroneously claims that when Congress, in the *Customs Administrative Act of 1938*, [Act of June 25, 1938, ch. 679, Section 3, 57 Stat. 1077], amended Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a), it only intended to modify the power of the Secretary of the Treasury to determine the *how* foreign goods should be marked to show country of origin, and not to deny the Secretary the power to prescribe *whether* a particular article was subject to marking. *Brief in Opposition* at 5-7.

Congressional debates which preceded the enactment of the 1938 Act, however, evidenced clear concern that the Secretary might by regulation determine the *scope* of operation of the marking law:

> Mr. McCORMACK: Under the proposed amendment, you want to make it [marking] discretionary with the Secretary of the Treasury, is that right?
>
> Mr. JOHNSON: No, sir.
>
> Mr. McCORMACK: You start out here and say:
>
> > Under such regulations as the Secretary of the Treasury may prescribe --
>
> Does that not change the mandatory provision and make it a discretionary provision?

> Mr. JOHNSON. No, sir; if there is any question about that, I do not believe there should be any objection to removing any doubt.

See *Customs Administrative Bill, Hearings before the Committee on Ways & Means, House of Representatives on H.R. 6738*, 75th Cong., 1st Sess. at 46. Congress resolved the dispute by removing from Section 304(a) the prefatory phrase "[u]nder such circumstances as the Secretary may by regulation prescribe." The first sentence of Section 304(a) now sets out a clear command: except as provided by statute "every article of foreign origin (or its container . . .) shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit . . . ." Congress has clearly reserved to itself the power to define the scope of operation of the marking law, including the power to determine when an article is "of foreign origin," and thus subject to marking.

By contrast, the Secretary's authority to make regulations respecting the requirement of marking appears in the second sentence of Section 304(a), and is limited to excepting goods from marking in certain circumstances prescribed by Congress, for example in cases where the article is incapable of being marked, cannot be marked prior to shipment without injury or in cases where "such exceptions can be justified on the basis of administrative experience." See *S. Rep. No. 75-249, 75th Cong., 1st Sess.* at 2 (1937); see also *H. Rep. No. 1465, 75th Cong., 3d Sess.* at 7. The Secretary's rulemaking authority is a limited one, and does not authorize the promulgation of regulations prescribing when a good is "foreign," and subject to marking, and when it is not foreign.

Furthermore, the government errs in suggesting that either 19 U.S.C. § 66, which dates from the Act of February 10, 1820, ch. 11, §§14, 15, 3 Stat. 543, or 19 U.S.C. § 1624, which authorizes the Secretary to issue "General regulations" to carry out the Tariff Act of 1930, empowers the issuance of the regulation at issue in this case, which adapts the *NAFTA Marking Rules,* 19 C.F.R. Part 102, to determining whether articles produced in this country are of "foreign origin," and subject to marking. The former statute, which has not been substantively amended since 1870, was in effect in 1938 when Congress amended the marking statute to limit the Secretary's rulemaking powers thereunder. The latter statute has not been amended since 1930. In any event, it is well-recognized that such general grants of rulemaking authority are ministerial in nature, and authorize the Secretary merely to prescribe the mode or proceedings for carrying into effect what Congress enacted. See *Morill v. Jones*, 106 U.S. 466 (1883); *Campbell v. United States*, 107 U.S. 407 (1883).

Article I, Section 8, Clause 3 of the U.S. Constitution grants the Congress plenary authority to "regulate commerce with foreign nations . . . ." This power extends to the importation of goods and continues until final delivery of the imported articles. *Wabash R. Co. v. Pierce*, 192 U.S. 179 (1904). The question of whether a good produced in the United States is an "article of foreign origin," subject to marking, or subject to "additional duties" for failure to mark under 19 U.S.C. § 1304(h), goes to the heart of Congress' power to regulate foreign commerce. Whether particular activity constitutes "foreign commerce" involves an inquiry concerning whether a transaction is connected with a foreign nation and is extraterritorial, and has always been a matter for ultimate determination by the courts. See *Veazie v. Moor,* 55 U.S. 568 (1853). As noted in *United States v. Gibson-Thomsen Co., Inc.,* 27 C.C.P.A. 267 (1940), there is no basis

to believe that Congress intended to regulate, by requiring marking or assessing marking duties on, new and different articles of commerce, produced in the United States, even if those articles are made in whole or in part from imported materials.

Under these circumstances, it is absurd to assume, as the government does (and as the Federal Circuit did in this case) that Congress intended to delegate to the Secretary the power to determine, *by regulation*, when an article is a "foreign article" subject to marking, much less that such regulations would be entitled to judicial deference.

B. The government misrepresents petitioner's position regarding Congress' power to "determine marking rules for NAFTA goods." *Brief in Opposition* at 8. Petitioner readily acknowledges that Congress authorized the promulgation of *NAFTA Marking Rules*, and their use in determining when an article is a "good of a Party" or a "good of an importing Party," for the purposes set out in NAFTA. Thus, if an article is imported into the United States from Canada or Mexico, the rules may be applied to determine whether the imported article is a "good of a Party."[1]

The issue of when an article produced in the United States is subject to marking under 19 U.S.C. § 1304(a) turns on the separate question of whether it is an "article of foreign origin." The NAFTA Marking Rules do not address this separate issue, nor does the *NAFTA Implementation Act* authorize their use for purposes of making this determination. Because the *NAFTA Implementation Act* contains a special

[1] The NAFTA Marking Rules may also be used to make the separate determination of whether a good is a "good of an importing Party," and thus eligible for the special and additional exception to marking required by NAFTA Annex 311.5(b)(viii).

rule precluding its construction to amend or repeal any other statute by implication, there is no basis for utilizing the NAFTA Marking Rules to define when an a good produced domestically is of "foreign origin."

C. The government errs in suggesting that Customs' regulation (19 C.F.R. § 134.35(a)) applying the NAFTA Marking Rules to the marking of domestically-produced goods is entitled to deference under the rule of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as applied to certain Customs regulations in *United States v. Haggar Apparel Co.*, 119 S.Ct. 1392 (1999). *Chevron* deference simply does not apply in the instant case because Customs did not have the authority to promulgate 19 C.F.R. § 134.35. See *Condo v. Sysco Corp.*, 1 F3d 599, 603 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

Chevron deference would apply only when the Secretary's authority to issue regulations is established. The issue of whether any particular NAFTA Marking Rule is "reasonable" is not presented in this appeal.

Chevron deference does not apply in the instant case as Congress clearly spoke to this issue. In *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), the Court set forth the two questions that need be answered when reviewing an agency's construction of the statute which it administers. "First, *always*, is the question whether Congress has directly spoken to the precise question at issue." *Id.* at 842 (emphasis added). Congress was clear in the NAFTA Implementing Act that nothing in the Act "shall be construed to amend or modify any law of the United States, except as specifically provided therein."

It is implausible to accept, as the government would have it, that Congress intended to have one set of country of origin marking rules for goods imported from non-NAFTA countries and another set of rules for those imports from NAFTA members. Congress did authorize the Secretary of the Treasury to promulgate regulations necessary or appropriate to implement NAFTA. However, Congress was clear in delineating the limit of this authorization to the extent that no regulation shall modify the existing marking rules.

The government's citations to *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) and *SEC v. Chenery Corp.*, 332 U.S. 203 (1947) are inapposite. While those cases hold that an agency has discretion to determine whether decisions entrusted to shall be made according to general rules or case-by-case determinations, this presupposes that the agency has been granted the authority to promulgate rules in the area at all. Where an agency does not possess such authority, no deference to the substance or form of its rules is required under *Chevron*.

CONCLUSION

The instant petition presents important and continuing issues of law concerning the relationship of NAFTA and its implementing act to pre-existing Federal laws. It also poses significant questions concerning the extent to which regulations adopted by the Secretary of the Treasury may limit or expand Congress' power to regulate foreign commerce. The petition for a writ of *certiorari* should be granted.

JOHN M. PETERSON
Counsel of Record
GEORGE W. THOMPSON
CURTIS W. KNAUSS
Neville, Peterson & Williams
Counsel for Petitioner
Bestfoods
80 Broad Street, 34th Floor
New York, New York 10004
(212) 635-2730